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In the

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1065

J. B. McBeth, Individually and
as Next Friend of Roger McBeth,
Petitioner,

v.

The Texas & Pacific Railway Company,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF TEXAS

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as Next Friend of Roger McBeth,
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The Texas & Pacific Railway Company,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF TEXAS

Your Petitioner, J. B. McBeth, Individually and as Next Friend for Roger McBeth respectfully petitions for the issuance of a Writ of Certiorari to review the judgment of the Court of Civil Appeals for the Second Supreme Judicial District of Texas in its cause number 16,796 styled as above.

OPINION

The opinion of the Court of Civil Appeals (A-13 to A-31 here in) is reported at ... S.W. 2d ....

JURISDICTION

This case was filed in the 153rd Judicial District Court of Tarrant County, Texas (TR. 2). Demand for trial by jury was duly made and the jury fee duly paid (TR. 209). Upon Respondent's Motion for Summary Judgment, the case was tried to the court without a jury and judgment was rendered on the 9th day of June, 1966, that the Texas & Pacific Railway Company was entitled to a judgment as a matter of law and that Petitioner should take nothing by his suit (TR. 186). Findings of fact were made by the trial court as to forty-two separately numbered matters (TR. 190; A-1) and conclusions of law based upon such facts were set forth in thirteen separately numbered propositions (TR. 197; A-9). The judgment (A-32) and opinion (A-13) of the Court of Civil Appeals affirming the findings and judgment of the trial court were dated and entered March 24, 1967. A timely Motion for Rehearing filed April 5, 1967 was overruled April 21, 1967 (A-32). Thereafter, Petitioner's Application for Writ of Error to the Supreme Court of Texas, timely filed in the Court of Civil Appeals May 22, 1967 and in the Supreme Court June 2, 1967, was refused without opinion on October 4, 1967 (A. 33) and Petitioner's timely Motion for Rehearing filed October 19, 1967 was overruled without opinion on November 1, 1967 (A-34).

The jurisdiction of this Court is invoked under 28 U.S.C., § 1257(3) since the Petitioner was denied the right of a trial by jury by the granting and affirmation of the summary judgment by the courts below.

QUESTIONS PRESENTED

1.

In a civil case, does the guarantee of due process provided by the Fourteenth Amendment include a right of trial by jury in state courts of equal dignity to the right of trial by jury in federal courts provided by the Seventh Amendment?

2.

In a civil case, does the action of a state court in holding that there were no fact questions presented for decision by a jury violate the 'fundamental fairness' guarantee provided by the due process clause of the Fourteenth Amendment when it appears from the record that fact questions were, in truth and actuality, presented and a jury duly demanded?

3.

Did the summary judgment granted by the state courts below deprive the Petitioner of the right of trial by jury in violation of the guarantee of due process accorded to Petitioner by the Fourteenth Amendment?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

(Text at A-34)

Constitution of the United States, Amendment Seven

Constitution of the United States, Amendment Fourteen

28 U.S.C., § 1257(3)

Constitution of the State of Texas, Article I, Sec. 15

Rule 166-A(b) and (c), Tex. Rules Civ. Proc.

STATEMENT OF THE CASE

How Federal Question Was Presented Below

Petitioner's federally guaranteed rights were first invaded by the trial court's final judgment. Petitioner immediately took general exception and gave notice of appeal (TR. 187), which procedure, under state law, preserved all questions for review. The federal question was raised by Point Eleven of Petitioner's brief to the Court of Civil Appeals (A-4). This point, along with all other points of error, was expressly overruled and the judgment of the trial court affirmed (A-31). The point was raised again as Point Eleven of Petitioner's Motion for Rehearing before the Court of Civil Appeals (A-32), and was again overruled by its order of April 21, 1967 (A-32). The federal question was presented to the Supreme Court of Texas by Point Six of Petitioner's Application for Writ of Error (A-33), which application was refused by order of that court entered October 4, 1967; and was again raised by Petitioner's Ground Six of his Motion for Rehearing before the Supreme Court of Texas (A-33),

which Motion for Rehearing was overruled by order entered November 1, 1967 (A-33).

Since the Supreme Court of Texas refused to consider the case on Petitioner's Application for Writ of Error, it is the judgment of the Court of Civil Appeals for the Second Supreme Judicial District of Texas that Petitioner seeks to have reviewed and reversed, it being the highest court of the state in which a decision could actually be obtained by Petitioner on the questions at issue. However, the judgment of that court did not become final until Petitioner's Application for Writ of Error had been refused by the Supreme Court of Texas and his Motion for Rehearing before that court denied on November 1, 1967. It is from the latter date that the time began to run in which Petitioner might file his Petition for Certiorari in this Court.

Statement of Facts

On the morning of January 14, 1964 Roger McBeth left his home in Grand Prairie to attend school at Arlington State College in Arlington. In a family automobile he traveled westward along West Main Street (Highway 80) until he reached Southwest 23rd Street. The northward extension of this street beyond West Main Street is designated Northwest 23rd Street. There he turned southward and drove across the grade crossing of Respondent's tracks. The Respondent's train struck his car in the left rear quarter panel catapulting it into the air and caused Roger to be thrown to the roadbed and severely injured.

A witness who had on the same morning left Arlington and was traveling eastward to his job in Grand Prairie was at the scene and saw the accident. His name is Andrew J. Renaker and he was sitting in his pickup truck at a stop sign which controlled the movement of Traffic northward from Southwest 23rd Street onto Highway 80. He watched as Roger McBeth made a turn leftward off of Highway 80 onto Southwest 23rd Street, and without apparent change of speed proceed to the crossing in the path of the oncoming train. Renaker could not see Roger close enough to see just where he was looking but neither did he he see him make a distinct movement of the head in either direction. (SF p. 12)

Injuries to Roger McBeth's brain with attendant loss of memory and neurological impairment of his ability to speak have robbed him of the power to say why he drove onto the crossing with the train so close at hand. Only by painstaking reconstruction of the conditions and circumstances existing at the time of the accident are we able to bring the happening into focus. These conditions and circumstances present the grounds for several inferences and explanations. Petitioner strenuously contends that it was not the proper province of the courts below to resolve these questions as a matter of law. It is instead the proper province of the jury.

The accident occurred at approximately 7:40 a.m. (S.F. p. 2). The day was clear but unusually cold. The minimum temperature was 4° Fahrenheit and the maximum 42°, with an average temperature of 23°. This was a departure from normal of minus 22°. (TR. p. 179) At 8:00 a.m. the weather

bureau at Southwest International Airport recorded a temperature of 6° Fahrenheit. (TR. p. 178)

Roger McBeth was then 17 years of age and was enrolled at Arlington State College. He was on his way to school on that morning but the record is totally silent as to whether it was for the purpose of attending class, studying for examinations or otherwise. The trial court's finding No. 10 (TR. p. 193) that he was en route to the college "* * * for the purpose of attending a class which met at 8:00 a.m. * * *" is wholly inferential and speculative.

At the point of the accident and for several miles in either direction, the railway tracks lie between two heavily traveled east-west thoroughfares joining the cities of Dallas and Grand Prairie on the east with the cities of Arlington and Fort Worth on the west. These are U. S. Highway 80 lying to the north of the crossing and West Jefferson Boulevard to the south. Inside the city, Highway 80 is designated as West Main Street by the city of Grand Prairie, Texas. (TR. p. 96)

In January of 1964, the distance from the curbline of Highway 80 to the nearest rail of the northernmost railway track was 59 feet. It was approximately the same distance from the nearest rail of the southernmost track to the curbline of Jefferson Boulevard. This amounts to about three car lengths between the nearest curbline of each of these roads and the nearest rail of the two sets of tracks at the Southwest 23rd Street crossing. (TR. p. 96)

In January of 1964, there were no electrically operated traffic control signals either on Highway 80 to the north, or upon Jefferson Boulevard to the south of the crossing. Neither were there railway crossing gates at the crossing. Automobiles approaching Southwest 23rd Street from the east on Highway 80 and from the west on Jefferson Boulevard were required to cross the oncoming and opposing lanes of traffic on each of these roads in order to make a left turn into Southwest 23rd Street and then approach the railway company's tracks in order to get over the crossing. (TR. p. 96)

The speed limits for both Highway 80 and Jefferson Boulevard at the east of Southwest 23rd Street were 40 miles per hour in January of 1964 and to the west of Southwest 23rd Street on Highway 80 the speed limit was 45 miles per hour. (TR. p. 96) The traffic in the vicinity of Southwest 23rd Street was heavy from 7:30 to 8:30 o'clock in the morning of the week days during January of 1964 and had been that way for a long time. The physical lay out of the area created a condition where motorists approaching from the east on Highway 80 and intending to cross the railway at Southwest 23rd Street were subjected to the hazard of trains heading toward the crossing but staying behind the motorists until they had made a left turn and entered the mouth of Southwest 23rd Street. The same condition existed for all other motorists approaching from either direction upon both Highway 80 and Jefferson Boulevard. The only motorists not subjected to this condition were those approaching from the north and from the south on Southwest 23rd Street itself. For motorists approaching this crossing

from the east on Highway 80 and desiring to pass over it, it was necessary that a left turn be made at an uncontrolled intersection, that a crossing of two opposing and oncoming lanes of traffic be negotiated with appropriate lookout being maintained for the hazards thus presented, that the oncoming and opposing lanes be negotiated fast enough to clear oncoming traffic, that automobiles turning out of Southwest 23rd Street be avoided as well as those continuing north and south on Southwest 23rd Street and that after entering Southwest 23rd Street a proper lookout was required to be maintained in both directions. (TR. pps. 96-97)

On the fateful morning Roger McBeth was proceeding in a westerly direction approaching the crossing on West Main Street or Highway 80. The train was behind him and approaching in a line parallel to his direction of travel. It was running 73 minutes behind schedule, its connection at Texarkana having been late. (TR. pps. 61 and 65) Roger sounded his horn as he passed the Shamrock Service Station located at 2034 West Main Street and within sight of the crossing. The manager of the station, John Blythe, heard the automobile horn, looked to West Main Street and saw Roger waving at him. Shortly after Roger passed, Blythe saw a train going west on the tracks south of his station. Blythe stated that he did not hear the train blow its whistle or ring its bell and that he was right across the highway from The Texas & Pacific Railway tracks and could have heard the horn and bell if they had been sounded. Shortly thereafter, he heard the train make a bumping noise and saw what looked like an explosion at the crossing on South-

west 23rd Street. (TR. pps. 99-100) The Respondent attached to its motion for summary judgment affidavits to the effect that the train blew its whistle almost continuously all the way through Grand Prairie and as it approached the crossing. (TR. pps. 89-91) At the same time, it was undisputed that Roger's car was equipped with a heater and radio in working condition. Notwithstanding the direct conflict in testimony thus existing and the fact that several different inferences could have been drawn from these circumstances, the trial court resolved all questions against Petitioner by its findings No. 22, 23 and 26, to the effect that when the Respondent's train reached a whistle post located about one-quarter of a mile east of the crossing, the engineer began to sound the whistle and continued to sound it until the locomotive had passed over the Southwest 23rd Street crossing and that there was nothing to have prevented Roger McBeth from hearing the whistle from and after the time the train reached a point one-quarter mile east of the crossing. (TR. pps. 194-195)

After he passed John Blythe's service station, Roger McBeth continued in a westerly direction on Highway 80 to its intersection with Southwest 23rd Street where he was to make his left turn onto Southwest 23rd Street preparatory to crossing Respondent's railway tracks. An old rusty red car pulled out from a position immediately ahead of Renaker and turned westward on Highway 80. After it had cleared the intersection Roger McBeth made his turn. In so doing he had to stay clear of opposing traffic. Although Renaker did not undertake to estimate just how many vehicles

were involved, he testified that the traffic that morning on Highway 80 was fairly heavy "the morning rush going to work. It was—I'd just say fairly heavy traffic * * *" It was heavy enough that Roger would have had to look for an opening so that he could make the left turn. "Yes, he would have to look for an opening in traffic before you made your turn." (S.F. p. 7)

When Roger McBeth began his left hand turn from Highway 80 onto Southwest 23rd Street, his automobile was approximately 100 feet north of the northernmost rail of Appellee's railroad track and at such time and until the accident his automobile was traveling at approximately 20 to 25 miles per hour. (TR. p. 194) It is virtually undisputed in the record that the blinker light at the crossing did not become visible to Roger McBeth until after he had made his left hand turn and entered Southwest 23rd Street. (TR. pps. 97, 103, 130 and 131) At this very point, according to the witness Renaker, Roger had caught an opening in the traffic, (S.F. p. 7) and thereafter crossed the two opposing lanes of traffic and entered Southwest 23rd Street. When the rear bumper of Roger's car passed over the south curbline of Highway 80 there remained 41.5 feet between the front bumper of his car and the nearest track of the railroad. (TR. p. 103)

Petitioner introduced into the record by means of the affidavit of M. C. McLain the text of a published bulletin of the National Safety Council of the United States entitled "Stopping Distances" which reflects the findings of the National Safety Council relative to various stopping dis-

tances of an automobile in given range of speeds. By the same affidavit, Petitioner introduced the sworn statement of McLain verifying the mathematical principles, calculations and formulae employed in calculating stopping distances of automobiles traveling at various rates of speed. (TR. pps. 101-102) The matters thus shown are undisputed in the record.

The bulletin of the National Safety Council points out that: "When a driver says he can stop on a dime, he means the last dime at the end of a long row of dimes. At 20 m.p.h. —including time for reacting and braking—it takes 47 feet, three car lengths or 846 dimes to stop safely. Including time for perception takes even longer. Here's the formula:

PERCEPTION +

REACTION +

APPLICATION =

TOTAL STOPPING DISTANCE

PERCEPTION—Awareness of dangerous traffic situation and decision how to handle it. Involves:

Knowledge of accident-causing conditions.

Ability to make decision quickly.

Good physical and mental shape.

Ability to see out of car.

Attention to job of driving.

(Perception time not included in chart.)

REACTION—Time between making up mind to brake and getting foot on brake pedal.

APPLICATION—Execution of decision to apply brakes. Involves:

Physical coordination.

Ability to operate brakes.

Wasted time here means trouble an instant later. Actual braking does not occur until brake shoes are in firm contact with brake drums. Firm, steady contact must be held until car stops."

The empirically established facts reflected by this scientific data are undisputed in the record.

Notwithstanding the contradictory effect of this scientific data which showed that it would have taken at least 47 feet for Roger McBeth to stop his car after having cleared the oncoming lanes of traffic opposing him on Highway 80, the trial court made a finding of fact that within the 41.5 feet then left to him "* * * Roger McBeth had sufficient time and distance immediately prior to the accident to have

stopped the automobile he was driving within 50 feet but not less than 15 feet from the nearest rail of the Defendant's railroad tracks but he did not do so." (TR. p. 197)

Appropriate issues on the question of impossibility of compliance by Roger McBeth with Section 86 of Art. 6701 (d) were raised by the following pleadings:

> A. After the electric signal device in question became clearly visible and gave warning of the immediate approach of a train, if it did, the said Roger McBeth by the exercise of ordinary care could not have stopped his automobile within fifty feet but not less than fifteen from the nearset rail of the railroad track and could not have stopped his automobile before it reached a position upon the track itself.
>
> B. Without admitting but still denying that any audible signals were emitted by the train within 1500 feet of the highway crossing, Plaintiff says that after any such signals became audible, if they did, and such engine by reason of its speed or nearness to such crossing became an immediate hazard, if in fact such conditions occurred, the said Roger McBeth by the exercise of ordinary care could not have stopped his automobile within fifty feet but not less than fifteen feet from the nearest rail of the railroad track and could not have stopped his automobile before it reached a position upon the track itself.
>
> C. Further, Plaintiff says that after the Defendant's train became plainly visible and in hazardous proximity to the crossing in question, if it did, the said Roger McBeth by the exercise of ordinary care could not have stopped his automibile within fifty feet but not less than fifteen feet from the nearest rail of the railroad track and could not have stopped his automobile

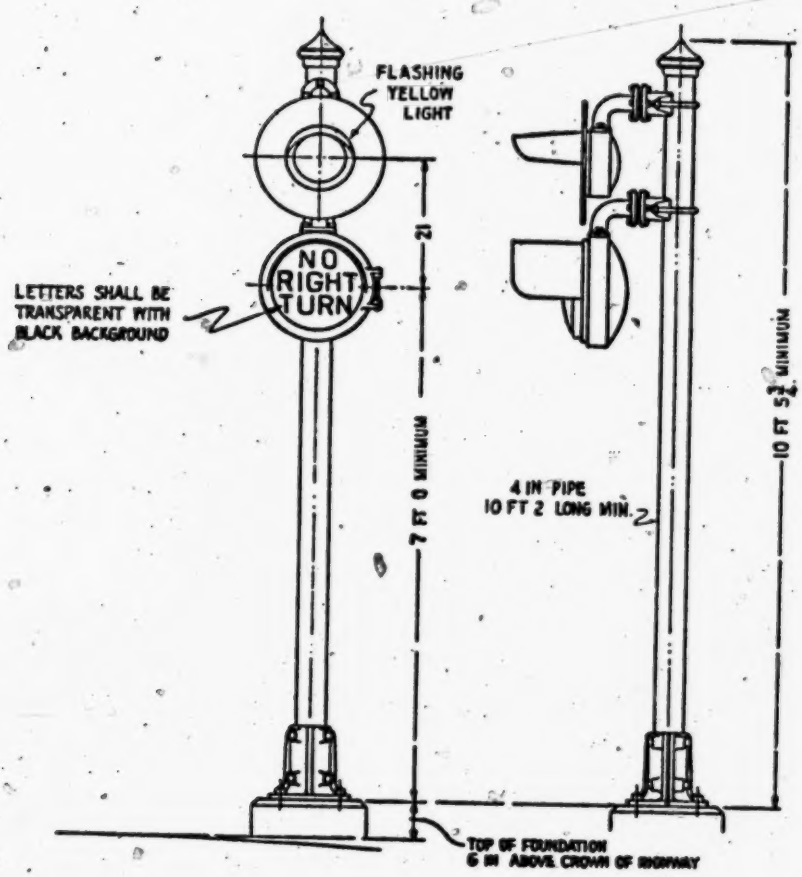
before it reached a position upon the track itself. (TR. pps. 32-33)

Petitioner's pleadings likewise raised the issue of sudden emergency, as to which it was pleaded that:

> Plaintiff would show that immediately prior to the collision in question, his minor son, Roger McBeth, was acting under an emergency which arose suddenly and unexpectedly. Such sudden emergency was not proximately caused by any negligent act or omission of the said Roger McBeth but was created by the negligent acts and omissions of the Defendant, The Texas & Pacific Railway Company. Such emergency called for immediate action upon the part of Roger McBeth without time for deliberation. After such sudden emergency arose, Roger McBeth acted as a person of ordinary prudence would have done under the same or similar circumstances. The negligent acts of the Defendant, Texas & Pacific Railway Company created such sudden emergency and were a proximate cause of the collision which is made the basis of this suit. (TR. 30-31)

The record shows without dispute that the crossing was not protected by a flagman or by crossing gates. (TR. p. 122 —Photograph No. 2 in folder) It also shows that for a crossing of this character of the American Railway Engineering Association had recommended installation of signals that would be visible to approaching motorists at a time when they were still travelling parallel to the railway tracks and before they had made a turn to cross the tracks. (TR. 108-110) It is undisputed that no such signal had been installed

at the crossing in question. The following figure is an illustrative diagram of the type of signal so recommended:



"NO RIGHT TURN" OR "NO LEFT TURN" SIGNAL

REASONS FOR GRANTING THE WRIT

The Constitutional Considerations

The first clause of the Seventh Amendment to the Constitution of the United States provides: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, * * *"

The Due Process Clause of the Fourteenth Amendment provides: "* * * nor shall any State deprive any person of life, liberty, or property without due process of law; * * *"

The view has long been held by many constitutional scholars that the Due Process Clause of the Fourteenth Amendment, made the entire Bill of Rights, applicable to the states. There have been fewer civil cases dealing with the question than criminal cases. At least by dicta, this view was rejected by the Court in the civil case of *Minneapolis, St. L.R. Co. v. Bombolis,* 241 U.S. 211. However, even before the Bombolis decision, the adamant position there propounded, that *none* of the first ten amendments were applicable to the states, had already been brought into question by *Chicago R. & Q.R. Co. v. Chicago,* 166 U.S. 226. There the Court held and that the Fourteenth Amendment prohibited the taking of property for public use without just compensation. Although this holding was made without expressly noticing that the same restriction was incorporated in the Fifth Amendment, the holding necessarily implied that the right thus protected was of such a character as to come within the protection of the due process clause.

In *Abington School Dist. v. Schempp,* 374 U.S. 203, 215-216, the Court held that all phases of the First Amendment

were included in "* * * the fundamental concept of liberty embodied in that [Fourteenth] Amendment."

In recent years the Court has moved rapidly to extend many Bill of Rights guarantees to state court criminal proceedings. Fourth Amendment guarantees have been extended to the states in *Ker v. California*, 374 U.S. 230; *Aguilar v. Texas*, 378 U.S. 108; and *Mapp v. Ohio*, 367 U.S. 643. Fifth Amendment protection against self-incrimination was extended to the states in *Malloy v. Hogan*, 378 U.S. 1. Sixth Amendment guarantees were extended to the states in *Klopfer v. North Carolina*, 386 U.S. 213; *Washington v. Texas*, 388 U.S. 14; *In re Oliver*, 333 U.S. 257; *Pointer v. Texas*, 380 U.S. 400; and *Gideon v. Wainwright*, 372 U.S. 335.

In the realm of state court criminal proceedings, the Court was confronted with negative views expressed in prior opinions similar to the negative view of the Bombolis case, supra. However, in *Pointer v. Texas*, the Court stated at 380 U.S. 406;

> In light of *Gideon*, *Malloy* and other cases cited in those opinions holding various provisions of the Bill of Rights applicable to the states by virtue of the Fourteenth Amendment, the statements made in *West* and similar cases generally declaring that the Sixth Amendment does not apply to the States can no longer be regarded as the law.

In respect of state court criminal proceedings, the decision to extend to the states, the various guarantees of the Bill of Rights, has turned on the Court's determination as to whether the particular guarantee in question is "* * * so

fundamental and essential to a fair trial, that it is incorporated in the Due Process Clause of the Fourteenth Amendment." *Washington v. Texas*, 388 U.S. at 17-18. In *Pointer v. Texas*, 380 U.S. at 404, the Court stated "* * * the fact that [a] right appears in the Sixth Amendment of our Bill of Rights reflects the belief of the Framers of those liberties and safeguards that [it is] a fundamental right essential to fair trial in a criminal prosecution."

It is Petitioner's position in this case, that the fact that the guarantee of a jury trial in civil cases is a right that appears in the Seventh Amendment of the Bill of Rights reflects the belief of the Framers of those liberties and safeguards that *it* is a fundamental right essential to a fair trial in civil cases; and that its application should be extended to the states under the due process clause of the Fourteenth Amendment.

Although this will involve a re-evaluation of such decisions as *Bombolis*, supra, the Court has stated in *Malloy v. Hogan*, 378 U.S. 1:

> The Court has not hesitated to re-examine past decisions according the Fourteenth Amendment a less central role in the preservation of basic liberties than that which was contemplated by its Framers when they added the Amendment to our Constitutional scheme.

It is also Petitioner's position that the right to a jury trial in civil cases is so fundamental and essential to a fair trial, that it would be necessary to incorporate it into the Due Process Clause of the Fourteenth Amendment, even if it had not been included in the Bill of Rights.

The fundamental character of this right is firmly attested by the fact that a guarantee of it has been incorporated in the constitution of virtually every state in the Union. Article I, Section 15 of the Constitution of the State of Texas provides:

> The right of trial by jury shall remain inviolate. The Legislature shall pass such laws as may be needed to regulate the same, and to maintain its purity and efficiency.

In *Parsons v. Bedford*, 28 U.S. 433, the Court stated:

> The trial by jury is justly dear to the American people. * * * Every encroachment upon it has been watched with great jealousy. The right to such a trial is, it is believed, incorporated into and secured in every State constitution in the Union.

Blackstone considered trial by jury to be the sine qua non of liberty:

> The trial by jury is looked upon as the glory of the English law * * * the most transcendant privilege which any subject can enjoy, or wish for, that he cannot be affected either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbors and his equals. * * * Because Rome, Sparta, and Carthage have lost their liberties, therefore those of England in time must perish. But it must be recollected, that those states, at the time when their liberties were lost, were strangers to the trial by jury. *Blackstones' Commentaries*, Gavit Ed. (1941) 689-90.

Speaking on a very practical plane, *Blackstone* pointed out:

> If [the judicial process] be entirely entrusted to the magistracy, a select body of men, usually chosen * * * by parties holding the highest offices in the state, their decisions will frequently haye an involuntary bias to-

> ward those of their own rank and dignity; for it is not to be expected, that the few should be always attentive to the interests and good of the many.
>
> * * * * *
>
> This, therefore, preserves in the hands of the people that share which they ought to have in the administration of public justice, and prevents the encroachments of the more powerful and wealthy citizens. Id., 690.

In *The Federalist Number 83* (Hamilton) a similar analysis is made of the underlying factors that go to make the jury trial in civil cases a right of such fundamental character.

> * * * The strongest argument in its favor is that it is a security against corruption. As there is always more time and better opportunity to tamper with a standing body of magistrates than with a jury summoned for the occasion, there is room to suppose that a corrupt influence would more easily find its way to the former than to the latter.

Even the most superficial review of the Court's recent decisions with respect to the Fourteenth Amendment makes it obvious that a much higher priority has been given to the extension of its application to criminal proceedings than to civil proceedings. This probably results from the more dramatic nature of criminal proceedings. Barbarities, patent on their face, are more easily surrendered by our society than those which are masked with subtle, sophisticated and devious strategems. The Court may have felt that it could proceed more boldly in dealing with patent barbarities.

Regardless of the reasons, the fact of priority is clear; and while Petitioner would not have the Court retract one syllable it has uttered in such recent decisions, Petitioner does

urge the Court to re-examine the order of priority of its extension of the Due Process Clause as between civil and criminal cases. There is sound reason to believe that in point of time, the denial of civil justice precedes and tends to produce criminal behavior—which in turn creates the problems attendant upon the administration of criminal justice.

The violence and crime in our streets today is unimpeachable evidence that something is seriously wrong in our society. Just what is wrong cannot be so unimpeachably established; but there is ample testimony from many authoritative sources that frustrated, repressed and angry men vent their pent up feelings in violent, irrational and antisocial ways.

If our society, through its officially established institutions, is engaged in imposing upon some of its members the very frustrations, repressions and despair that ultimate in uncontrollable anger and irrational violence, then the need for re-examination of those establishments is both urgent and imperative.

Every community (tribe, family and other social group) has its unofficial Establishment in addition to its official establishment. Without it a community could not function, grow and evolve into new forms. It is not subject to being abolished. It exists in communist societies as thoroughly and pervasively as in western democratic societies. It is in many aspects beneficial and beneficent. Inevitably, and by its very nature, the Establishment is composed of the most aggressive and power-oriented members of the community. In some instances they are also the most intelligent. It is a

phenomenon that is neither to be condemned nor praised. It is simply a fact of life with which our democratic society must learn to deal rationally and intelligently.

Every local Establishment controls in some degree its local official establishment. If the local Establishment is sufficiently cohesive, its power approaches the absolute, with the attendant degree of corruption that goes with such power. The local judicial system is subject to its influence. It nominates the appointive judges and finances the elections of the elective judges. It is the friend and ally of public officials 'worthy' of its approval. It is the implacable foe of those it disapproves. Even judges holding life tenure are much inclined to want to be regarded as worthy in the eyes of the local Establishment. Elected judges who do not maintain their worthiness are not judges for long.

Mr. Justice Tom C. Clark has described in plain yet sympathetic language the position in which a local elective judge finds himself:

> One cannot try cases when he is thinking of rallies, speeches, meetings, and other political campaigning. He cannot sit on the bench or work on opinions and decisions while he is on a political platform, kissing babies or passing out cards. I am sure most of the judges would say that politics takes a significant portion of their time. And this is true all the time, not just in a political year. Judges in politics are not unlike other politicians —*they are running for re-election all the time.* (Emphasis supplied) They cannot be blamed for this. The people have required them to stand for election, and the ambition of a judge to remain a judge is no different than that of other officeholders. Moreover, the expenses of electioneering are becoming more burden-

> some and judges' salaries are comparatively smaller than other public officers. Counting the dues for clubs, contributions for charities, etc., essential to any political figure's success, the amount runs into a sizable sum. Most judges cannot afford it. Moreover, they must deal with the political leaders, get their continued support and often use their facilities in the campaign. All these things remove the judge from his judicial atmosphere and blur his image as a non-partisan officer of the court. 50 Judicature 119

In takes no genius, then, to see that the most powerful members of a community exert a powerful influence upon the judicial apparatus of that community. And, the poor, the disadvantaged, the most completely unsophisticated people do see this fact of life; do understand it; do very justifiably view courts and lawyers with fear and suspicion; and look upon the law as their enemy. They may be inarticulate but they do understand.

If a scientific explanation of this phenomenon be needed, it has long since been supplied. In his famed letter to Professor Einstein setting forth his views on the question Why War? Professor Freud makes clear the close relationship between violence and law. It becomes apparent from his analysis that our judicial system is simply the process by which organized society brings to bear its violence upon its individual members. It is also the process through which a powerful and unchecked member of the Establishment may accomplish a socially permissible exercise of violence against a weaker member. Professor Freud says:

> You begin with the relations between Might and Right, and this is assuredly the proper starting point for our inquiry. But, for the term "might," I would

substitute a tougher and more telling word: "violence." In right and violence we have today an obvious antinomy. It is easy to prove that one has evolved from the other and, when we go back to origins and examine primitive conditions, the solution of the problem follows easily enough. I must beg your indulgence if in what follows I speak of well-known, admitted facts as though they were new data; the context necessitates this method.

Conflicts of interest between man and man are resolved, in principle, by the recourse to violence. It is the same in the animal kingdom, from which man cannot claim exclusion; nevertheless men are also prone to conflicts of opinion, touching, on occasion, the loftiest peaks of abstract thought, which seem to call for settlement by quite another method. This refinement is, however, a late development. To start with, brute force was the factor which, in small communities, decided points of ownership and the question which man's will was to prevail. Very soon physical force was implemented, then replaced, by the use of various adjuncts; he proved the victor whose weapon was the better, or handled the more skillfully. Now, for the first time, with the coming of weapons, superior brains began to oust brute force, but the object of the conflict remained the same: one party was to be constrained, by the injury done him or impairment of his strength, to retract a claim or a refusal. This end is most effectively gained when the opponent is definitively put out of action—in other words, is killed. This procedure has two advantages; the enemy cannot renew hostilities, and, secondly, his fate deters others from following his example. Moreover, the slaughter of a foe gratifiies an instinctive craving—a point to which we shall revert hereafter. However, another consideration may be set off against this will to kill: the possibility of using an enemy for servile tasks if his spirit be broken and his life spared. Here violence finds an outlet not in slaughter but in subjugation. Hence springs the practice of giving quarter; but the victor,

having from now on to reckon with the craving for revenge that rankles in his victim, forfeits to some extent his personal security.

Thus, under primitive conditions, it is superior force —brute violence, or violence backed by arms—that lords it everywhere. We know that in the course of evolution this state of things was modified, a path was traced that led away from violence to law. But what was this path? Surely it issued from a single verity; that the superiority of one strong man can be overborne by an alliance of many weaklings, that *l'union fait la force*. Brute force is overcome by union, the allied might of scattered units makes good its right against the isolated giant. Thus we may define "right" (i.e., law) as the might of community. Yet it, too, is nothing else than violence, quick to attack whatever individual stands in its path, and it employs the selfsame methods, follows like ends, with but one difference; it is the communal, not individual, violence that has its way. But, for the transition from crude violence to the reign of law, a certain psychological condition must first obtain. The union of the majority must be stable and enduring. If its sole *raison d'etre* be the discomfiture of some overweening individual and, after his downfall, it be dissolved, it leads to nothing. Some other man, trusting to his superior power, will seek to reinstate the rule of violence and the cycle will repeat itself unendingly. Thus the union of the people must be permanent and well organized; it must enact rules to meet the risk of possible revolts; must set up machinery ensuring that its rules—the laws—are observed and that such acts of violence as the laws demand are duly carried out. This recognition of a community of interests engenders among the members of the group a feeling of unity and fraternal solidarity which constitutes its real strength. A Letter from Professor Sigmund Freud, Dated September, 1932, to Professor Albert Einstein Written On The Proposal Of The League Of Nations And Its Institute Of Intellectual Co-Operation At Paris,

France Under The Topical Heading Why War? and Published In Volume 2 Of The International Series Of Open Letters In 1933; Weinberg, *Instead of Violence*, Grossman Publisher, New York, 1963, pp. 203-204.

The genius of the jury system is that it interposes a "union of the people" in microcosm between the socially ordained apparatus of violence and the individual. The more imperfectly the jury system works, the closer we are to a system of pure violence for settling conflicts of interest among men. The more perfectly it works and the more nearly that the jury is truly representative of all the people, the nearer we will be to a system of laws and not of men.

A judge can say black is white, up is down, before is after: so can a jury. The difference is that when a judge does so, the community has not acted: when a jury does so, it is the community that has acted.

Ideally, the judicial system should be like Caesar's wife, above suspicion. To the extent that a judge is believed to have been biased or corrupt in rendering a verdict (whether or not he actually was) the integrity and effectiveness of the judicial system is impaired by the shadow of doubt and suspicion thus cast across it. If the judge places upon a jury the responsibility for rendering a verdict, any resultant doubt and suspicion falls upon the community and does not impugn the judicial system itself. Moreover, in civil cases, the judge has ample and expeditious means for rectifying what he believes to have been a biased or corrupt verdict. With the stroke of a pen he can grant a new trial. Rectifying a judge's verdict is an infinitely more difficult, expensive,

time-consuming and uncertain task. Local appellate judges are subject to influences virtually identical to those falling upon local trial judges. Moreover, local appellate opinions are not subjected to the white light of publicity and intense scrutiny that falls upon the opinions of this Court. Less than a half dozen people outside the judiciary have enough knowledge of the details of this case either to approve or to criticize the opinion of the Court of Civil Appeals.

It is fully as important to maintain the appearance of justice as it is to maintain actual justice. If the members of a social group have faith in the integrity of the machinery that has been set-up to administer justice, the feelings of unity and fraternal solidarity of which Professor Freud spoke will be engendered. If the members of that group look upon the judicial apparatus with suspicion and fear and regard it as an instrument by which they are held in subjugation, then violence is the almost inevitable consequence.

A situation fraught with enormous potential for mischief is created when a single judge takes away from a jury the power to render a verdict in a case where the interests of a party manifestly vested with overwhelming power are in conflict with the interests of a party marked with none of the attributes of power. Such a decision will always be attended with doubt and suspicion; and if there be any valid reason for the jury system in the first place, it properly should be. It is to the best interest of society as a whole that such a decision be made by a jury. For the weak party, the right of trial by jury is so fundamental that it may be

equated with the right to a trial. Without it, there is too often no real trial at all.

Examining the Issues of Fact

In deciding whether there are issues of fact actually involved in this case, the Court must necessarily review the evidence presented to the trial court. Petitioner recognizes that it is the general rule that the decision of a State court upon a quesion of fact ordinarily will not be reviewed by this Court. However, there are two exceptions to this rule, stated in *Aetna Life Ins. Co. v. Dunken*, 266 U.S. at 394 as follows:

> (1) Where a federal right has been denied as the result of a finding shown by the record to be without evidence to support it, and (2) where a conclusion of law as to a federal right and findings of fact are so intermingled as to make it necessary, in order to pass upon the federal question, to analyze the facts.

Petitioner says that this case clearly comes within exception (2) above and also comes within the clear meaning of exception (1). A finding that there is no question of fact is a finding that there is a total absence of conflicting evidence. If there is conflicting evidence in the record then the finding is not supported by the record in the same sense employed in exception (1).

As Petitioner interprets the rules relating to the proper subject matter of this petition, it is not here appropriate to brief the merits of the evidence questions. However, extensive briefing of these matters will be found in Petitioner's

Application for Writ of Error to the Supreme Court of Texas which is made a part of the record filed herewith.

CONCLUSION

Wherefore, premises considered, Petitioner prays this Honorable Court to issue its most gracious Writ of Certiorari and to make real the promise and ideal of our Constitution so long revered by English speaking peoples everywhere and so eloquently phrased by Blackstone in speaking of the English subject: "* * * that he cannot be affected either in his property, his liberty or his person, but by the unanimous consent of twelve of his neighbors and equals."

Respectfully submitted,

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Attorney for Petitioners.

TRIAL COURT PROCEEDINGS

Findings of Fact and Conclusions of Law

In accordance with plaintiff's request dated June 17, 1966, the Court makes the following separate findings of fact and conclusions of law:

FINDINGS OF FACT

1. The accident made the basis of this suit occurred at about 7:40 a.m. on January 14, 1964. It was a cold, clear day with the visibility unlimited.

2. The accident made the basis of this suit occurred on Southwest 23rd Street in Grand Prairie, Texas, at a point where the tracks of The Texas and Pacific Railway Company cross Southwest 23rd Street. Said crossing is located at the western edge of the City of Grand Prairie, Texas, and said crossing is generally located between Grand Prairie, Texas, and Arlington, Texas.

3. At the place where the accident occurred, and for a mile or more east of the crossing where the accident occurred, the tracks of The Texas and Pacific Railway Company are straight, and the same run generally east and west. Said tracks are paralleled on the north by West Main Street in Grand Prairie, Texas, which street is also known as U. S. Highway 80. Said tracks are paralleled on the south by West Jefferson Street, which street is known in Arlington, Texas, as East Abrams Street.

4. Roger McBeth was born April 10, 1946. He has lived in Grand Prairie, Texas, since April, 1953. From September 17, 1963, until the date of the accident on January 14, 1964, he attended Arlington State College, Arlington, Texas, as a student. He attended Arlington State College five days each week and had a class at 8 o'clock each morning. Roger McBeth was, therefore, familiar with the Southwest 23rd Street crossing, where the accident occurred, and was generally familiar with the distances and general location of said crossing in relation to West Main Street (U. S. Highway 80) and West Jefferson Street.

5. On the date of the accident the said Southwest 23rd Street crossing, where the accident occurred, was equipped with warning signs and electric signal devices which gave warning to motorists of the approach of trains. Said signs and electric signal devices had been located at said crossing for several years prior to said accident. Said signs and electric warning devices and their location at the time of the accident, and for several years prior thereto, were as follows:

On both the north and south sides of said crossing there was a mast or pole which contained the standard railroad crossing sign, which stated "Railroad Crossing." On said pole there was another sign reading "Two Tracks," and just below said sign there on each pole an arm from which there was hung four heads or lights. Said lights are colored bright red, and are installed in four pairs, the two lights

of each pair alternately flashing on and off. On both sides of each pole there was also an electric sign which read "Two Tracks," and below said sign was a reflectorized sign reading "Stop on Red Signal." At the time of said accident there were four additional signs at said crossing; one such sign was located on both the west and east sides of Southwest 23rd Street and on both the north and south sides of said crossing. Each of said signs is reflectorized, and is approximately three feet in length and two feet wide. On each of said signs are the words, "Danger—Two Tracks—Watch for Train on Each Track." Said red flashing lights at said crossing were operated by an electric current, which current activated said devices and started the same operating when a west-bound train running on defendant's northernmost track reached a point 2,474 feet east of said crossing, after which said devices continued to operate and flash red lights and warning to the traveling public and to those approaching said crossing until said train had crossed and cleared said crossing.

6. Southwest 23rd Street runs generally north and south.

7. The photographs which are attached to the affidavit of Al Volkland, a commercial photographer, were made by him on the date of the accident. Said photographs are marked "Defendant's Exhibits 1, 2, and 3." They truly and correctly portray said crossing, the electrical warning devices, the signs, and the general area of the crossing, as well as the general area east of the crossing on the date of the accident.

8. There were no obstructions at or east of the Southwest 23rd Street crossing which would have obstructed the

view to the east of a motorist approaching said crossing from the north traveling south on Southwest 23rd Street at the time of the accident.

9. At the time of the accident all of the electrical warning devices located at said crossing were functioning properly, and had been functioning properly after defendant's west-bound train reached a point 2,474 feet east of said crossing.

10. The accident occurred at a time when Roger McBeth was en route from his home in Grand Prairie, Texas, to Arlington State College, Arlington, Texas, for the purpose of attending a class which met at 8:00 a.m.

11. Before turning left onto Southwest 23rd Street, Roger McBeth had been traveling in a westerly direction along and upon West Main Street (U. S. Highway 80) in Grand Prairie, Texas.

12. When Roger McBeth reached the intersection of Southwest 23rd Street and said West Main Street, he made a left-hand turn onto Southwest 23rd Street.

13. At a point at or near said crossing the south edge of West Main Street is located 60 feet north of the northernmost rail of defendant's railroad tracks.

14. At the point at or near the intersection of Southwest 23rd Street and West Main Street (U. S. Highway 80), said West Main Street is 80 feet wide.

15. At the time of the accident, Roger McBeth was driving a 1963 model Chevrolet automobile.

16. The accident made the basis of this suit occurred when Roger McBeth attempted to drive his said automobile, which was traveling in a southerly direction upon Southwest 23rd Street, across defendant's northernmost railroad track, and, as he attempted to do so, the said automobile he was driving was struck by defendant's passenger train which was traveling in a westerly direction along and upon defendant's northernmost track.

17. At the time of the accident, defendant's said passenger train was traveling at a rate of speed of 55 miles per hour.

18. The authorized speed limit of trains at or near said crossing was 60 miles per hour.

19. At all times after Roger McBeth began his left turn from West Main Street onto Southwest 23rd Street, the electric warning devices were operating properly, and said devices and the warning signs located at said crossing were clearly visible to him.

20. When Roger McBeth began his left-hand turn from West Main Street onto Southwest 23rd Street, his said automobile was at least 100 feet north of the northernmost rail of defendant's railroad tracks, and at such time and until the accident Roger McBeth's automobile was traveling at a rate of speed between 20 and 25 miles per hour.

21. As Roger McBeth approached said crossing immediately prior to the accident, four flashing red lights were clearly visible to him, and said flashing red lights were continuously flashing from the time that he began his said turn until after the accident.

22. There is a whistle post located alongside defendant's railroad tracks about one quarter of a mile east of said crossing.

23. When defendant's train reached said whistle post, the Engineer began to sound the whistle on the locomotive, and defendant's Engineer continued to sound the whistle until the locomotive had passed over the Southwest 23rd Street crossing.

24. As defendant's passenger train approached said crossing, the headlight and the Mars light on the front of the locomotive were burning.

25. There was nothing to have prevented Roger McBeth from seeing defendant's west-bound passenger train at any time from and after the time defendant's said train was at least one quarter of a mile east of said crossing.

26. There was nothing to have prevented Roger McBeth from hearing the whistle on defendant's said train from and after the time said train reached a point one quarter of a mile east of said crossing.

27. From the time Roger McBeth began his left turn from West Main Street (U. S. Highway 80) onto Southwest 23rd Street until the accident, Roger McBeth neither stopped nor slowed the speed of the automobile he was driving.

28. As Roger McBeth approached said railroad crossing, he did not stop the automobile he was driving within 50 feet, but not less than 15 feet, from the nearest rail of defendant's said railroad tracks.

29. As Roger McBeth approached said railroad crossing, he did not attempt to stop the automobile he was driving within 50 feet, but not less than 15 feet, from the nearest rail of defentant's said railroad tracks.

30. As Roger McBeth approached said railroad crossing, he did not slow the speed of the said automobile he was driving prior to the accident.

31. As Roger McBeth approached said railroad crossing just before the accident, a clearly visible electric or mechanical signal device gave warning to him of the immediate approach of defendant's said train.

32. As Roger McBeth approached said railroad crossing just prior to the accident, defendant's locomotive was approaching said crossing within approximately 1,500 feet of said crossing, and said locomotive then and there emitted a whistle signal which was audible from such distance, and said locomotive, by reason of its speed and nearness to such crossing, was then an immediate hazard.

33. As Roger McBeth approached said crossing just prior to the accident, defendant's west-bound passenger train was approaching said crossing, and said approaching train was plainly visible to the said Roger McBeth, and said train was at said time in hazardous proximity to such crossing.

34. The Engineer on defendant's west-bound passenger train was R. H. Rodgers, and the Fireman of defendant's said train was W. T. Vawter.

35. Defendant's Engineer first saw the automobile driven by Roger McBeth when said automobile came by the motor

vehicle of Andrew Renaker which was stopped on Southwest. 23rd Street, and at that time defendant's locomotive was about 80 feet east of the Southwest 23rd Street crossing.

36. The instant defendant's Engineer saw the automobile Roger McBeth was driving, he threw the emergency brake lever and placed defendant's entire train in an emergency stop. The emergency application of the breakes was made before the impact.

37. Defendant's Fireman, W. T. Vawter, did not see the automobile Roger McBeth was driving until the said automobile whipped right in front of the train, at which time the train was right at the crossing.

38. From the time Roger McBeth began his left-hand turn from West Main Street (U. S. Highway 80) onto Southwest 23rd Street until the time of the accident, he did not apply the brakes on his said automobile, and there was nothing to have prevented the said Roger McBeth from doing so during such time.

39. Just prior to the accident, Roger McBeth had sufficient time and distance immediately prior to the accident to have stopped the automobile he was driving within 50 feet but not less than 15 feet from the nearest rail of the defendant's railroad tracks, but he did not do so.

40. Just prior to the accident, Roger McBeth could have stopped the automobile he was driving within 50 feet but not less than 15 feet from the nearest rail of defendant's railroad tracks, but he did not do so.

41. Defendant's Engineer and Fireman did not discover that the said Roger McBeth was in a position of peril at a time when they could have, by the use of the means at hand, consistent with the safety of the train and its occupants, avoided the collision.

42. After said Engineer and Fireman actually discovered and realized the perilous position of Roger McBeth, they used all means at hand consistent with the safety of the train and its occupants which they could have used in an effort to avoid the collision.

CONCLUSIONS OF LAW

1. Section 86, Article 6071d, Revised Civil Statutes of Texas provides in pertinent part as follows:

> "Section 86. Whenever any person driving a vehicle approaches a railroad grade crossing, the driver of such vehicle shall stop within fifty (50) feet but not less than fifteen (15) feet from the nearest rail of such railroad and shall not proceed until he can do so safely when:
>
> "(a) A clearly visible electric or mechanical signal device gives warning of the immediate approach of a train;
>
> "(c) A railroad engine approaching within approximately fifteen hundred (1500) feet of the highway crossing emits a signal audible from such distance and such engine by reason of its speed or nearness to such crossing is an immediate hazard;
>
> "(d) An approaching train is plainly visible and is in hazardous proximity to such crossing."

2. Section 143(a) of said Article 6701d provides that the violation of any of the provisions of said Article 6701d shall

constitute a misdemeanor unless such violation is by law declared to be a felony.

3. Immediately prior to the accident, Roger McBeth violated Section 86(a) of Article 6071d, Revised Civil Statutes of Texas, in that he failed to stop the automobile he was driving within 50 feet but not less than 15 feet from the nearest rail of the defendant's railroad tracks, when a clearly visible electric or mechanical device gave him warning of the immediate approach of defendant's train. Such violation on the part of Roger McBeth was negligence and a proximate cause of the accident.

4. Immediately prior to the accident, Roger McBeth violated Section 86(c) of Article 6071d, Revised Civil Statutes of Texas, in that he failed to stop the automobile he was driving within 50 feet but not less than 15 feet from the nearest rail of defendant's railroad tracks when defendant's west-bound locomotive was then approaching said crossing within approximately 1500 feet and emitted a whistle signal audible from such distance, and said defendant's locomotive, by reason of its speed and nearness to such crossing, was then and there an immediate hazard. Such violation on the part of Roger McBeth was negligence and a proximate cause of the accident.

5. Immediately prior to the accident, Roger McBeth violated Section 86(d) of Article 6701d, Revised Civil Statutes of Texas, in that he failed to stop the automobile he was driving within 50 feet but not less than 15 feet from the nearest rail of the defendant's railroad tracks, when defendant's west-bound train was then approaching said crossing,

and said train was then and there plainly visible to him and in hazardous proximity to said crossing. Such violation on the part of Roger McBeth was negligence and a proximate cause of the accident.

6. Immediately prior to the accident, Roger McBeth failed to keep a proper lookout for his own safety, and such failure on his part was a proximate cause of said accident.

7. As Roger McBeth approached the railroad crossing, immediately prior to the accident, he failed to stop the automobile he was driving before going upon defendant's railroad tracks. Such failure on the part of Roger McBeth was negligence and a proximate cause of said accident.

8. Immediately prior to the accident, Roger McBeth drove his automobile onto the railroad crossing and into the path of defendant's train which was then and there in full view of the said Roger McBeth. Roger McBeth's act in so doing was negligence and a proximate cause of the accident.

9. The above violations of Section 86 of Article 6701d, Revised Civil Statutes of Texas, by Roger McBeth immediately prior to the accident were neither excusable nor justified in law.

10. Immediiately prior to the collision in question, Roger McBeth was not acting under a sudden emergency not proximately caused by his own negligence. Any emergency under which Roger McBeth was acting at the time of the accident was proximately caused by Roger McBeth's own negligence.

11. The evidence does not raise an issue of gross negligence on the part of the defendant, The Texas and Pacific Railway Company.

12. Neither the defendant nor its employees ever acted with heedless and reckless disregard of the rights of Roger McBeth or others.

13. J. B. McBeth, individually and as Next Friend of Roger McBeth, is not entitled to recover damages against the defendant, The Texas and Pacific Railway Company, arising out of the unfortunate accident made the basis of this suit, and judgment was, therefore, entered for the defendant and against the plaintiff, with the costs taxed accordingly.

SIGNED and ORDERED FILED, this 28th day of June, 1966.

HAROLD CRAIK

JUDGE, 153rd District Court
Tarrant County, Texas.

PROCEEDINGS IN THE COURT OF CIVIL APPEALS

Appellant's Point of Error

(Filed September 30, 1966)

POINT ELEVEN

The Court erred in granting Appellee's motion for summary judgment in that such motion involved determinations of the credibility of affiants and witnesses, the weight to be given various items of evidence and the inferences to be drawn from inconclusive evidence; and thereby deprived Appellant of the right of trial by jury guaranteed by Article 1, Section 15 of the Constitution of the State of Texas, and by the Seventh and Fourteenth Amendments to the Constitution of the United States.

OPINION

Summary judgment case.

Appellant, J. B. McBeth, individually and as Next Friend of his minor son, Roger McBeth, seeks to recover a monetary judgment against appellee, The Texas & Pacific Railway Company, for injuries and damages arising out of an automobile-train collision which occurred at a grade crossing on Southwest 23rd Street in Grand Prairie, Texas, on the morning of January 14, 1964. Appellee's motion for summary judgment was granted.

The record before this Court reveals the following undisputed facts:

Roger McBeth, born in Longview, Texas, on April 10, 1946 moved to Grand Prairie, Texas, in April of 1953. He was

still residing there on January 14, 1964, a period of almost eleven years. On September 17, 1963, he enrolled at Arlington State College. Thereafter, he attended classes five days a week beginning at 8:00 o'clock A.M. on each of those days. He continued this schedule until January 14, 1964.

The cold and clear morning of January 14, 1964 with unlimited visibility found Roger McBeth driving west in a 1963 Chevrolet automobile on West Main Street (U. S. 80) headed toward the intersection of Southwest 23rd Street and its grade crossing in the City of Grand Prairie, Texas. As he passed a Shamrock Service Station at 2034 West Main Street, he sounded the horn of his automobile and waved to John Blythe, the service station manager. Shortly after McBeth passed the station, John Blythe saw a train going west on the tracks south of the station.

The west bound train, which John Blythe observed passing his station, was appellee's passenger train No. 3. It consisted of two diesel units followed by five cars. It was traveling on the northern set of two sets of parallel tracks. These tracks are situated between two heavily traveled thoroughfares, West Main Street (U. S. 80) on the north and West Jefferson Boulevard on the south and are not obstructed from view of motorists traveling east on West Main Street for at least one-half mile east of Southwest 23rd Street. These two thoroughfares and tracks are crossed by Southwest 23rd Street, a street running north and south.

On the morning in question at the place where West Main Street (U. S. 80) crosses Southwest 23rd Street, the intersection was uncontrolled in that there were no traffic control signals. Thus, automobiles approaching the intersection

from the east and desiring to turn left on Southwest 23rd Street had to cross two lanes of oncoming traffic. From the south curb line of West Main Street (U. S. 80) at this intersection to the first rail of appellee's tracks was a distance of 59 to 60 feet, and from the center of West Main Street to the nearest rail was more than 100 feet.

At the crossing itself, appellee had erected or caused to be erected various signs and electrical and mechanical signaling devices. These signs and signaling devices were unobstructed. Appellee had maintained electrical or mechanical signaling devices at this crossing for a period of ten years prior to January 14, 1964. On both the northwest and southeast corners of the crossing, appellee had erected a pole which had attached to it a standard railroad crossing sign reading, "Railroad Crossing." On each pole just below that sign was another sign which read "Two Tracks" and just below that was an electric sign which also read "Two Tracks." The pole on the northwest corner had a similar electric sign on its south side. Extending out from each pole just below the non-electrical sign reading "Two Tracks," was an arm from which hung four heads or lights, two on each pole facing north and south, respectively, on Southwest 23rd Street. These lights, which were colored bright red, were operated by an electric current which activated said lights, when, as here, a west bound train reached a point 2,474 feet east of the crossing. The signal lights continued to operate until the train had cleared the crossing. While in operation the lights of each pair alternately blinked off and on. Also, on each pole below the preceding named signs was a reflectorized

sign reading, "Stop on Red Signal." In addition to the two poles and their respective signs and lights, there were also four additional reflectorized signs positioned on the northwest, northeast, southeast and southwest sides of the crossing. These signs were setting at an angle so they faced northeast, northwest, southwest and southeast respectively. Each of these signs was approximately three feet in length and two feet in width and read, "Danger—Two Tracks—Watch for Train on Each Track."

The crossing and the tracks approaching straight from the east were unobstructed by any permanent object for at least one-half mile.

At the same time the train and Roger McBeth were approaching from the east, Andrew J. Renaker, Jr., driving a 1963 Ford pickup was about to cross the tracks on Southwest 23rd Street proceeding north with the intention of turning right on West Main Street (U. S. 80). Just before Renaker made his way across the tracks, he observed the red signal lights on the warning device come on and begin blinking. These signals were initiated when appellee's train approaching from the east was 2,474 feet from the crossing. Looking to the east, Renaker saw the train coming with two headlights burning and heard its whistle blowing. The fact of whether train's whistle sounded or not may be in dispute as John Blythe, the Shamrock Service Station Manager, said "I did not hear the train blow its whistle." Renaker crossed the tracks and stopped behind another automobile at the intersection which was waiting for the traffic to clear on West Main Street.

Generally speaking, the traffic that morning was the normal heavy morning traffic. The speed limit on West Main Street (U. S. 80) for traffic on the east side of Southwest 23rd Street was 40 miles per hour; and, on the west side, 45 miles per hour.

After waiting, Renaker observed the car in front of him move out, and turn left. As Renaker started to roll forward, he saw a Chevrolet coming west on West Main Street. It made a left turn in front of him and proceeded south on Southwest 23rd Street toward the tracks, never making a stop nor slowing its speed. Renaker estimated the speed of the automobile to be between 20 and 25 miles per hour. When the Chevrolet had moved alongside of him, Renaker noticed that it was occupied by one person, a white male, later identified as Roger McBeth. Renaker also observed that the red lights on the warning device were still blinking and heard the train still blowing its whistle as it approached the crossing. As Roger McBeth's Chevrolet moved past Renaker's pickup, R. H. Rodgers, the engineer of appellee's train, which was then some 80 feet east of the crossing and approaching at a speed of 55 miles per hour, observed the Chevrolet for the first time. The instant the engineer saw the Chevrolet driven by McBeth he threw the emergency brake, placed the entire train in emergency stop and continued to sound the whistle. Renaker never did see Roger McBeth look to the east or west before attempting to cross the tracks. As the Chevrolet attempted to cross the tracks, Charles S. Johnson, a student at Arlington State College, who was driving on West Jefferson Street on his way to

school, saw Roger McBeth's automobile for the first time. Just prior to this time Johnson had observed the train moving to his right, heard its whistle blowing and saw the signal lights at the Southwest 23rd Street crossing flashing a color he could not identify because he is red and green color blind. Appellee's train struck the McBeth automobile in the left side toward the back. Johnson and appellee's engineer Rodgers both noted that Roger McBeth never varied the speed of his automobile one bit from the time they first observed him until the collision. The record is totally void of any evidence intimating that Roger McBeth was ever aware of any automobile traffic, warning signs, signals or appellee's train before the collision. The force of the collision hurled his automobile in a southwesterly direction for a considerable distance and Roger McBeth was thrown onto the road bed.

The purpose of the summary judgment procedure as provided for in Rule 166-A, Texas Rules of Civil Procedure, is the "elimination of patently unmeritorious claims or untenable defenses." Gulbenkian v. Penn, 151 Tex. 412, 252 S.W. 2d 929, 931 (1952).

However, the Rule must be cautiously applied because it was never intended to be used as a tool "to deprive litigants of their right to a full hearing on the merits of any real issue of fact." Gulbenkian v. Penn, 151 Tex. 412, 252 S.W. 2d 929, 931 (1952), quoting with approval from Kaufman v. Blackman, 239 S.W. 422, 428 (Dallas Civ. App., 1951, writ ref., n.r.e.). But when a proper case arises as is contemplated by the Rule, its application will facilitate the expeditious

administration of justice. We have concluded that this is such a case.

Article 6701d, Section 86, V.A.C.S., provides in part as follows:

"Sec. 86. Whenever any person driving a vehicle approaches a railroad grade crossing, the driver of such vehicle shall stop within fifty (50) feet but not less than fifteen (15) feet from the nearest rail of such railroad and shall not proceed until he can do so safely when: (a) A clearly visible electric or mechanical signal device gives warning of the immediate approach of a train; * * * (d) An approaching train is plainly visible and is in hazardous proximity to such crossing."

The Supreme Court of Texas in construing Article 6701d, Section 86(d) has declared that the duty of a motorist to stop within fifty (50) but not less than fifteen (15) feet of the nearest rail of a crossing is not absolute, but is conditioned upon the existence of certain conditions. Missouri-Kansas-Texas Railroad Company v. McFerrin, 156 Tex. 69, 291 S.W. 2d 931, 935 (1956). This would necessarily be true of the other subdivisions under Section 86. The Court further held that when these conditions were conclusively established, the duty to stop became absolute, and thus a directed verdict, or as here a summary judgment, would be proper.

The conditions creating a duty upon a motorist approaching a railroad crossing to stop in compliance with Subdivision (a) are as follows: (1) An electrical or mechanical signaling device is at the crossing; (2) A signaling device is "plainly

visible"; (3) A signaling device is giving warning of the immediate approach of a train; and (4) A train is approaching.

With respect to Subdivision (d) the conditions are as follows: (1) A train is approaching the crossing; (2) The train is "plainly visible"; and (3) The train is in "hazardous proximity" to the crossing.

The undisputed facts in this case established conclusively that the conditions above recited existed on the morning of the collision and created an absolute duty on the part of Roger McBeth to stop within the statutory distance of the nearest rail of the crossing. Under the facts, it cannot be seriously contended that Roger McBeth was not familiar with these tracks, their respective location to the street upon which he was traveling and that these tracks were used regularly by railway traffic.

A person who has knowledge of a railroad crossing is charged with knowledge of existing danger from trains which may be moving thereon. Texas & N. O. R. Co. v. Burden, 146 Tex. 109, 203 S.W. 2d 522, 529 (1947); Gulf C. & S. F. Ry. Co. v. Gaddis, 208 S.W. 895, 896 (Tex. Comm. App., 1919); Wichita Falls & Southern R. Co. v. Anderson, 144 S.W. 2d 441, 443-444 (Eastland Civ. App. 1940, dismissed, judg. correct); Higginbotham v. International-Great Northern R. Co., 99 S.W. 2d 338, 340 (Amarillo Civ. App., 1936, dismissed); San Antonio & A. P. Ry. Co. v. Singletary, 251 S.W. 325, 326 (San Antonio Civ. App., 1923, dismissed); 48 Tex. Jur. 2d 342, "Railroads", § 321. The Supreme Court of Texas in Texas & N. O. R. Co. v. Burden, 203 S.W. 2d 522,

529 supra, quoting with approval from the Commission of Appeals opinion in Gulf C. & S. F. Ry. Co. v. Gaddis, 208 S.W. 895 supra stated:

"All men in possession of their faculties are charged with knowledge that a railroad track is a dangerous place, and the law will not permit them to go upon the track, even at a public highway, without being charged with a recognition of the danger attending such action and the use of such care as ordinary prudence would dictate in so doing."

In Higginbotham v. International-Great Northern R. Co., 99 S.W. 2d 338 supra, the Amarillo Court quoting with approval from the San Antonio Court's opinion in San Antonio & A. P. Ry. Co. v. Singletary, 251 S.W. 325, 326 supra, stated:

"A railroad track is of itself a proclamation of danger, imposing upon the traveler at the railroad crossing a positive duty of using care to avoid trains." To the same effect see also Wichita Falls & Southern R. Co. v. Anderson, 144 S.W. 2d 441, 443 supra. Thus, in preparing to make his turn and in making his turn, Roger McBeth was charged with knowledge of the existing danger at the Southwest 23rd Street crossing from trains which might be traveling thereon.

Further, it is established law that a person who intends to cross a railroad crossing has the duty of exercising ordinary care and diligence to ascertain whether a train is approaching. Galveston, H. & S. A. R. Co. v. Wells, 121 Tex. 310, 50 S.W. 2d 247 (1932); 48 Tex. Jur. 2d 325-326, "Railroads", § 317.

Before Roger McBeth reached the intersection to make his turn, he could have observed that the crossing over which he must subsequently pass had signal lights and signs posted. These signals were in operation, blinking off and on, before he ever reached the Southwest 23rd Street intersection. As Roger McBeth approached the intersection he was confronted by appellee's three foot by two foot sign reading "Danger—Two Tracks—Watch for Train on Each Track." This sign was positioned at an angle on the southwest corner of the intersection in order that traffic approaching this intersection from the east with the intention to turn and proceed across this crossing would be warned of the number of tracks and of railway traffic which might be moving thereon. It is conceded that the signal lights were unobstructed and observable to one reaching the intersection. The distance from the center of the intersection to the nearest rail of appellee's tracks was more than 100 feet. Thus Roger McBeth had at least 100 feet of opportunity to observe these flashing lights and signs before reaching the tracks. These lights continued to operate at all times up to the collision and were never obstructed at any point. Prior to, during, and after Roger McBeth's turn, the numerous signs, both painted and electric, gave warning of railway traffic moving on the tracks. Also, from the center of the intersection Roger McBeth had an unobstructed view for several hundred feet of the tracks approaching straight from the east. As he approached the tracks from the center of the intersection, the slightest turn of his head to the left or the slightest glance to the left would have revealed appellee's approaching train which consisted of seven units. Due to the

relative speed of the train and Roger McBeth's automobile, respectively, and the fact of the collision establishes that the train was within "hazardous proximity" of the crossing and "plainly visible" to him during the time of Roger McBeth's turn at the intersection and at all times thereafter.

The Supreme Court in Missouri-Kansas-Texas Railroad Co. v. McFerrin, 156 Tex. 69, 291 S.W. 2d 931 (1956) P. 940, wrote as follows:

"There is in the record expert testimony from a surveyor which clearly tends to establish that after the deceased made his turn toward the track and at all times after he came within fifty feet thereof he could have seen the train if he had looked to his right. Ordinary care for his own safety required that he look to his right before passing through the stopping zone. We therefore hold, as a matter of law, that the train was 'plainly visible' when the deceased entered, or at least while he was within the statutory stopping area."

Prior to the preceding quoted matter, the Court held:

"* * * before it can be said in a given case that an approaching train was 'plainly visible' as a matter of law, it must appear, as a matter of law, that a reasonably prudent person, situated as was the motorist and exercising ordinary care for his own safety, should have seen it." 291 S.W. 2d 936.

With respect to whether the train was within "hazardous proximity" of the crossing, the Court considered the relative

speeds of the train and automobile along with the other circumstances and wrote as follows:

"We hold, as a matter of law, under the facts and circumstances of this case, that a reasonably prudent person, situated as was the deceased, should have known that an attempt to proceed over the crossing ahead of the train, was hazardous. We accordingly hold, as a matter of law, that at the time the train became 'plainly visible' it was 'in hazardous proximity' to the crossing." 291 S.W. 2d 940.

In considering the facts of this case in light of the law pronounced in the McFerrin case, supra we find and hold that Roger McBeth on the occasion in question was under a duty to stop. His failure to do so constituted negligence per se. Such negligence as a matter of law was a proximate cause of the collision in question.

The collision would not have occurred had Roger McBeth stopped his car in compliance with the duty imposed upon him under the conditions prescribed by the statute.

We further find and hold that Roger McBeth was guilty of common law negligence because of (1) his failure to keep such a lookout for his own safety as a person of ordinary prudence in the exercise of ordinary care would have kept under the same or similar circumstance; (2) his failure to stop before going upon the tracks, and (3) in driving his car onto the crossing when the train was in full view, and that such acts and conduct in each instance was a proximate cause of the collision.

It follows from what we have said that in our opinion the evidence showed conclusively that McBeth was not acting under a sudden emergency. Any emergency under which he acted was created by his own negligence.

The appellant is therefore precluded from obtaining any recovery. Texas & New Orleans Railroad Co. v. Day, 159 Tex. 101, 316 S.W. 2d 402 (1958).

We are of the opinion that the evidence did not raise issues of fact as to whether (1) Roger McBeth was in a situation where it was impossible for him to comply with the statute and (2) that he was in that situation as a result of no negligence on his part. Hammer v. Dallas Transit Co. 400 S.W. 2d 885, 887 (Tex. 1966).

In Southern Pacific Company v. Matthews, 335 F. 2d 924, 927 (5th Cir., 1964, cert. den. 379 U.S. 970), a case involving a collision between a train and an automobile, testimony in the record showed that from 20 feet of the nearest rail a person could see for a distance of 225 feet down the track and a panoramic photograph in evidence showed that at a distance of 50 feet from the crossing there was a clear view of the track for at least 250 feet. The driver of the automobile said he was looking for a train and that he did not see it until he was on the tracks. The Court stated:

"* * * Considering only the testimony of the appellees and their witnesses, and the unidsputed proof as to the physical layout, the inescapable conclusion is that had L. D. Matthews looked, as the law required, he would have

seen the approaching train in time to have stopped before reaching the tracks." 335 F. 2d 926.

The opinion continued:

"* * * In any event, at twenty feet from the track the photograph demonstrates what is clear from the testimony of Parker, that at this distance the appellees had a clear view of that portion of the tracks on which the train was traveling. Testimony which is at variance with physical facts is no evidence * * *" 335 F. 2d 927.

The Court held, as a matter of law, that the railroad was entitled to judgment in that there was no proper issue of fact for the jury to decide.

The appellant contends that McBeth could neither have seen the train nor have observed the signals flashing prior to the time he reached the intersection to commence his turn. This it was argued was because it was essential that he give his undivided attention to finding an opening in the traffic. Then to drive his automobile safely across the two lanes of early morning rush hour traffic at such a speed (20-25 miles) that when he had passed safely across this traffic, it was impossible for him to avoid collision with the train. This argument presumes that McBeth could not make any effort to stop his car until its rear end had cleared the edge of the street he was leaving and that his reaction time would not permit him to stop. It also presumes that on-coming traffic he was crossing in front of was bearing down on him and was so near that he was not required to look at the road in front of him after he made the turn. We think

this argument is untenable. The appellant appears to stress McBeth's inability to see the train when he made his turn rather than his inability to see the flashing signals and other signs. It is apparent that had he looked in the direction he was going he would have seen the flashing signal. This signal warned of the movement of something on the tracks. It is like a knock on the door or the ringing of the doorbell. While you may not know the identity of the one initiating the signal you are on notice that someone is at the door. In this case there is nothing to explain the failure to see the signal or thereafter to prevent McBeth from turning his head or eyes to either direction to determine what was on the track.

The appellant's argument could be interpreted to indicate that McBeth was negligent in making the turn at the intersection when he did because of the nearness of oncoming traffic when he knew before making the turn that he must cross the railroad tracks and perhaps be required to stop.

Appellant introduced the affidavits of appellant J. B. McBeth and M. C. McLain, an attorney of record in this case for appellant. Neither of these gentlemen witnessed the accident. Attached to J. B. McBeth's second affidavit were certain photographs allegedly representing the scene of the accident on January 14, 1964, and at various times thereafter, certain photographs allegedly representing the scene as it unfolded before Roger McBeth on the day of the collision, and a photograph of Roger McBeth's automobile after the collision. Attached to Attorney M. C.

McLain's affidavit were three exhibits, two of which he said were published by the National Safety Council and are entitled "Stopping Distances" and "Brake Analysis", respectively, and the third exhibit consists of excerpts from some printed matter he claimed was published by the American Railway Engineering Association entitled "Signals for Highway-Railway Grade Crossing".

The affidavits contain many statements which would be inadmissible as evidence. They contain opinions and conclusioms. They presume matters which find no support in record. The documentary exhibits attached to the McLain affidavit are not properly identified, and no predicate is made or established for their being received into evidence.

The Supreme Court in Gaines v. Hamman, 163 Tex. 618, 358 S.W. 2d 557, 562 (1962), wrote:

> "* * * this Court in Tobin v. Garcia, 159 Tex. 58, 316 S.W. 2d 396 * * * said that under the provisions of Rule 166-A affidavits to be effective either to support or oppose a motion for summary judgment 'must be made by competent affiants with personal knowledge of the statements in them, which statements must be so worded that if given on the witness stand they would be admissible as evidence.' Obviously mere conclusions will not suffice. * * *"

Since neither J. B. McBeth nor McLain, the affiants, witnessed the accident then neither could have known the exact conditions which existed at the time of the accident. Their affidavits are fraught with opinions and conclusions based upon conjecture and speculation. Attorney McLain attempted to conduct an experiment by his affidavit with-

out showing that the experiment was made under the same or similar conditions as existed at the time of the accident. Appellant places great weight and reliance upon the three exhibits that are atached to McLain's affidavit. Said exhibits are referred to in the affidavit as "Stopping Distances" of the National Safety Council and a portion of Chapter 9 of the Manual of the American Railway Engineering Association. These exhibits are clearly hearsay They are ex parte instruments. There is no evidence in the record that said exhibit are applicable in any way to the established conditions which existed at the scene of the accident involved in this case.

In Thedorf v. Lipsey, 7th Cir., 237 F. 2d 190 (1956), the Appellant contended that the trial court erred in refusing to admit into evidence the "Manual of the Motor Vehicle Department of Wisconsin" pertaining to stopping distances under various circumstances. The Court of Appeals held that it was proper to exclude said Manual and said: "The manual which plaintiff sought to introduce purported to have been issued by the State and contained certain statistics bearing upon stopping distances under various circumstances. It sought to inform motorists of normal expectations in traffic under normal conditions. It was not endowed with the characteristics of a statute; it was not legislative action, but had been issued, apparently, by the Department to supply information and suggestions to the travelling public. It could have had no probative effect upon the question of negligence on the part of defendant. If it was intended by plaintiff's offer to supply the jury with evidence as to what was a safe stopping distance for defendant

after he discovered plaintiff and the motorcycle at the time of the accident, it was incompetent for the reason that the opinions, conclusions and statistics included in it were unsworn statements made by parties outside the presence of the court, who were not submitted as witnesses and who could not be cross-examined. It comprised merely ex parte statements of third persons, incompetent for any purpose in the trial of the cause." 237 F. 2d 192.

Appellant contends that the photographs attached to J. B. McBeth's second affidavit show all that Roger McBeth could have seen as he approached the intersection and came upon the crossing immediately prior to the accident. We disagree. No camera has a lens wide enough to include what a person with good vision can see. Such persons are able to see to the side as well as straight ahead. This is called peripheral vision. The camera used in taking the questioned photographs was not equipped to pick up and portray the side or peripheral areas. Roger McBeth's peripheral vision would have permitted him to see far more as he approached the crossing than is shown by the photographs. The photographs make no allowance for any movements Roger McBeth may or could have made by turning either his eyes or his head to the right or left just prior to the accident. Higginbotham v. Bagley, 346 S.W. 2d 142 (Beaumont Civ. App., 1961, writ dism.).

The undisputed facts properly before the court conclusively showed that there was no issue of gross negligence

on the part of the appejllee and that neither appellee nor its employees acted with heedless and reckless disregard of the rights of Roger McBeth.

On the other hand we think that such facts conclusively show that the conduct of Roger McBeth on the occasion in question constituted statutory and common law negligence proximately causing the collision and the resulting injuries to his person and damages to the car he was driving. All points of error are overruled and the judgment of the trial court is affirmed.

Jack M. Langdon,

Associate Justice.

JUDGMENT

March 24, 1967.

This cause came on to be heard on the transcript of the record and the same having been reviewed, it is the opinion of the Court that there was no error in the judgment. It is therefore ordered, adjudged and decreed that the judgment of the trial court in this cause be and it is hereby affirmed.

It is further ordered that Appellant, J. B. McBeth, and his surety, Fidelity and Deposit Company of Maryland, pay all costs in this behalf expended, for which let execution issue, and that this decision be certified below for observance.

Appellant's Motion for Rehearing

11. The Court of Civil Appeals erred in overruling Appellant's Point Eleven, reading as follows:

> "The Court erred in granting Appellee's motion for summary judgment in that such motion involved determinations of the credibility of affiants and witnesses, the weight to be given various items of evidence and the inferences to be drawn from inconclusive evidence; and thereby deprived Appellant of the right of trial by jury guaranteed by Article 1, Section 15 of the Constitution of the State of Texas, and by the Seventh and Fourteenth Amendments to the Constitution of the United States."

Order Overruling Motion for Rehearing

April 21, 1967.

This day came on to be heard motion by Appellant for a rehearing in this cause, and said motion having been duly considered by the Court is hereby overruled.

PROCEEDINGS IN THE SUPREME COURT OF TEXAS

Application for Writ of Error

(Filed Ct. Civ. App., on the 22nd day of May, 1967, and in the Supreme Court on June 2, 1967)

POINT SIX

The Court of Civil Appeals erred in holding that Respondent was entitled to a summary judgment against Petitioners in that the granting of such summary judgment involved determinations of the credibility of affiants and witnesses, the weight to be given various items of evidence and the inferences to be drawn from inconclusive evidence; and thereby deprived Petitioner of the right of trial by jury guaranteed by Article 1, Section 15 of the Constitution of the State of Texas, and by the Seventh and Fourteenth Amendments to the Constitution of the United States.

ORDER

October 4, 1967.

Application of Petitioner for writ of error to the Court of Civil Appeals for the Second Supreme Judicial District having been duly considered, and the court having determined that the application presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said application be, and hereby is, refused.

It is further ordered that applicant, J. B. McBeth, Individually and as next friend of Roger McBeth, and surety, Fidelity and Deposit Company of Maryland, pay all costs incurred on this application.

MOTION FOR REHEARING

(Filed October 19, 1967)

GROUND SIX

The Supreme Court has erred in refusing Petitioner's Application for Writ of Error and in holding that no reversible error was presented by Petitioner's Point of Error Six, reading as follows:

> "The Court of Civil Appeals erred in holding that Respondent was entitled to a summary judgment against Petitioners in that the granting of such summary judgment involved determinations of the credibility of affiants and witnesses, the weight to be given various items of evidence and the inferences to be drawn from inconclusive evidence; and thereby deprived Petitioner of the right of trial by jury guaranteed by Article 1, Section 15 of the Constitution of the State of Texas, and by the Seventh and Fourteenth Amendments to the Constitution of the United States.

ORDER

November 1, 1967.

Petitioner's motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The United States Constitution, Amendment Seven. In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be

preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

The United States Constitution, Amendment Fourteen, Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C., §1257(3). Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

Texas Constitution, Article I, Sec. 15. The right of trial by jury shall remain inviolate. The Legislature shall pass such laws as may be needed to regulate the same, and to maintain its purity and efficiency.

Rule 166-A (b) and (c), Tex. Rules Civ. Proc.

(b) For Defending Party. A party against whom a claim, counter-claim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c Motion and Proceedings Thereon. The motion shall be served at least ten days before the time specified for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1065

J. B. McBETH, INDIVIDUALLY AND AS NEXT FRIEND OF ROGER McBETH, *Petitioner*

v.

THE TEXAS AND PACIFIC RAILWAY COMPANY, *Respondent*

Response to Petition for Writ of Certiorari

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1065

J. B. McBETH, INDIVIDUALLY AND AS NEXT FRIEND OF ROGER McBETH, *Petitioner*

v.

THE TEXAS AND PACIFIC RAILWAY COMPANY, *Respondent*

Response to Petition for Writ of Certiorari

The Texas and Pacific Railway Company, Respondent, respectfully files this response to the petition for writ of certiorari filed in this Honorable Court by J. B. McBeth, Individually and as Next Friend of Roger McBeth, seeking review of the judgment of the Court of Civil Appeals for the Second Supreme Judicial District of Texas.

OPINION

The opinion in this cause is reported in 414 S.W. 2d 45.

JURISDICTION

Petitioner initiated proceedings in this cause by filing a petition in the 153rd Judicial District Court

of Tarrant County, Texas, seeking damages as the result of a collision between one of Respondent's trains and Petitioner's automobile driven by Petitioner's son, Roger McBeth (Tr. 2). Petitioner requested a jury trial and paid the required fee (Tr. 209). Respondent moved for summary judgment in its favor based upon all pleadings on file in the cause, all interrogatories and requests for admissions and answers thereto, the affidavits in support of Respondent's motion and all other instruments properly before the Court (Tr. 158-161). At the hearing on the motion for summary judgment, in addition to hearing the arguments of Counsel in support of their respective positions, Counsel for Petitioner requested the Court's permission to call Andrew J. Renaker, a witness to the collision, to the witness stand and make his testimony a part of the record before the Court (Tr. 185). Respondent did not object and the Court granted Petitioner's request. Respondent's motion for summary judgment was granted (Tr. 185-187), and upon Petitioner's written request (Tr. 188), the Court consented to make findings of fact and conclusions of law (Tr. 190-200). Petitioner duly and timely prosecuted an appeal through the Appellate Courts of the State of Texas without success.

Petitioner erroneously seeks to invoke the jurisdiction of this Court under 28 U.S.C., § 1257(3) on the grounds that the granting and affirming of Respondent's motion for summary judgment deprived him of the right of trial by jury.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

To Petitioner's list of constitutional provisions, statutes and rules involved, Respondent would add:

Statute:

Article 6701d, § 86 (a) and (d), Revised Civil Statutes of Texas:

"Sec. 86. Whenever any person driving a vehicle approaches a railroad grade crossing, the driver of such vehicle shall stop within fifty (50) feet but not less than fifteen (15) feet from the nearest rail of such railroad and shall not proceed until he can do so safely when:

"(a) A clearly visible electric or mechanical signal device gives warning of the immediate approach of a train;

* * *

"(d) An approaching train is plainly visible and is in hazardous proximity to such crossing."

Federal Rule of Civil Procedure:

28 U.S.C., Rule 56(b) and (c):

"(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

"(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of the hearing may serve opposing affidavits. The judgment sought shall be

rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

POINTS OF REPLY

1.

The action of the trial court granting Respondent's motion for summary judgment and its affirmance by the Appellate Courts did not violate any right of trial by jury since this was a proper case for summary judgment in that the undisputed facts established as a matter of law that Roger McBeth was guilty of both statutory and common law contributory negligence, and no issue of fact was raised for the consideration of a jury militating against such negligence, thus precluding any possible recovery from Respondent.

2.

The due process clause of the Fourteenth Amendment does not encompass the Seventh Amendment right of trial by jury and, therefore, no federal constitutional issue nor federal question is before this Honorable Court.

STATEMENT OF THE CASE

Undisputed Facts in the Record

On the morning of the collision, January 14, 1964, Roger McBeth, who was almost 18 years of age and had been living in the City of Grand Prairie for 10 years and nine months immediately preceding that date, left his home to attend classes at Arlington State College (Tr. 68, 69, 72). He had enrolled at Arlington State College almost four months prior to that date and had been attending classes five days a week during that time, said classes beginning at 8:00 o'clock A.M. on each of those days (Tr. 69, 72).

The weather that morning was clear and cold (Tr. 176-178). Visibility was unlimited (Tr. 176-178).

In traveling to school that morning, Roger McBeth proceeded west on West Main Street (U.S. 80) toward the Southwest 23rd Street intersection and crossing, which was the place of the collision (Tr. 2, 99). West Main Street (U.S. 80) runs east and west through the City of Grand Prairie, paralleling Respondent's tracks which are situated immediately to the south (Tr. 19, 155). Immediately to the south of Respondent's tracks and paralleling them is Jefferson Boulevard (Tr. 88, 155). The two streets and Respondent's tracks approach the Southwest 23rd Street crossing straight from the east and the terrain is level and unobstructed for at least one-half mile (Tr. 155, 163, 166, 167).

The Southwest 23rd Street crossing on that day was blanketed with all sizes and types of signs, elec-

trical and painted, and with electrical and mechanical signaling devices (Tr. 19, 122, 123, 165, 166).[1] The electrical and mechanical signaling devices were operated by an electrical current which activated them when a train approching from the east reached a point 2,474 feet from the crossing (Tr. 19). Respondent had maintained these electrical devices at this crossing for a period of at least 10 years prior to the collision (Tr. 75, 82). These devices, in addition to the multitude of printed signs, were unobstructed and clearly visible to motorists traveling west on West Main Street (U.S. 80) and approaching this crossing at Southwest 23rd Street (Tr. 122, 166). In approaching and upon reaching the intersection with Southwest 23rd Street, but prior to entering the intersection, the flashing lights of the warning signals located on the southeast corner of the crossing became plainly visible (Tr. 116, 165, 166). Also, on that day as one approached the intersection from the east he was confronted by a three foot by two foot sign positioned on the southwest corner of the intersection at an angle facing such oncoming traffic and containing the words "DANGER TWO TRACKS WATCH FOR TRAIN ON EACH TRACK" (Tr. 19, 122, 166).

The intersection itself was uncontrolled in that there were no traffic signals located there (Tr. 4). Automobiles approaching from the east, as was Roger McBeth, and desiring to turn left, had to cross two traffic lanes (Tr. 5). The distance from the center of West Main Street (U.S. 80) to the nearest rail of

[1]See pages 12-14 of Appellee's Brief for a complete description of this crossing and its warning signs and devices.

Respondent's tracks was more than 100 feet (Tr. 21), and the distance from the south curb line to the nearest rail was 60 feet (Tr. 80 [P. 7, Petitioner's First Request for Admissions], 82).

Thus, as Roger McBeth traveled west on West Main Street (U.S. 80) toward the Southwest 23rd Street intersection and crossing, he could have observed from approximately one-half mile away, and at all times thereafter, that the crossing over which he must subsequently pass had signal lights and signs posted there to warn him and other travelers of railway traffic which might be traveling thereon (Tr. 2, 19, 86, 99, 124, 125, 155, 166, 176-178).

Respondent's passenger train No. 3 consisting of two diesel units and five cars was also approaching the crossing from the east (Tr. 34, 48, 79, 82). The train was traveling on the northern of two sets of parallel tracks (Tr. 2, 155) at a speed of 55 miles per hour, which was five miles per hour below the speed limit (Tr. 79).

While Roger McBeth and Respondent's train were approaching from the east, Andrew J. Renaker, Jr. was driving north on Southwest 23rd Street in a 1963 Ford Pickup, and was about to cross Respondent's tracks with the intention of turning right on West Main Street (U.S. 80) and proceeding on to his place of employment (Tr. 86). Just before Renaker reached the tracks, he observed Respondent's signal lights come on and begin flashing (Tr. 86). These signals, it will be remembered, were initiated by an electrical current when a train approaching from the

east reached a point 2,474 feet from the crossing (Tr. 19). Looking to the east Renaker saw the train approaching with its two headlights burning (Tr. 36). Proceeding on across the tracks Renaker stopped behind an automobile at the intersection which was waiting for the traffic to clear on West Main Street (U.S. 80) (Tr. 86). Generally speaking, the traffic was the usual heavy morning traffic (Tr. 4). After a very short time the automobile in front of Renaker moved out (Tr. 86). Almost immediately thereafter Renaker observed a Chevrolet approaching the intersection from the east on West Main Street (U.S. 80) (Tr. 86). The Chevrolet was occupied by one person, later identified as Roger McBeth (Tr. 87). The Chevrolet upon reaching the intersection proceeded to make a left turn and continue south on Southwest 23rd Street toward the tracks (Tr. 86-87).

At this point, one must remember that the warning lights located at the crossing had been flashing on and off for some time before Roger McBeth reached the intersection prior to his turn (Tr. 86-87). The record conclusively establishes that the warning lights on the southeast corner of the crossing were visible to motorists approaching from the east on West Main Street (U.S. 80) before reaching the Southwest 23rd Street intersection and before having an opportunity to turn left and proceed across Respondent's tracks (Tr. 122, 165, 166). Of great significance is the fact that no statement is to be found in the affidavits placed into the record by Petitioner that the southeast signal lights *were not visible*[2] prior to reaching the

[2]Emphasis ours throughout unless otherwise indicated.

intersection and at all times thereafter. The physical facts established by the record and a common understanding of light dispersion dictate that these lights were visible (Tr. 165, 166). In fact, Petitioner admitted that the signal lights could be seen from the intersection (Tr. 119), the center of which was over 100 feet from Respondent's nearest rail (Tr. 21).

Also, the record conclusively establishes and without dispute that Roger McBeth was no stranger to this neighborhood (Tr. 68, 69, 72). He was in a familiar environment (Tr. 68, 69, 72). He had been approaching this clearly visible and unobstructed crossing for at least one-half mile (Tr. 155, 163, 166, 167).

Thus, Roger McBeth reached the intersection with Respondent's clearly visible, warning lights flashing in his face and made his turn and headed toward Respondent's tracks. Nothing in the record remotely suggests that the movement of Roger McBeth's automobile was affected by the traffic as he made his left turn that morning. Renaker observed as Roger McBeth passed him that the red lights on Respondent's signaling device were still flashing on and off (Tr. 86).

The Engineer of Respondent's train first observed Roger McBeth's Chevrolet as it moved past Renaker's pickup (Tr. 80, 82). The train was then some 80 feet east of the crossing and still approaching at 55 miles per hour, five miles per hour less than the speed limit (Tr. 79, 80, 82, 90). The instant he saw the Chevrolet Respondent's Engineer threw the emergency brake and placed the entire train in emergency stop (Tr. 80, 82, 90).

Roger McBeth never stopped (Tr. 86, 88). From the time Renaker first observed Roger McBeth, he neither slowed nor increased the speed of his automobile, which was estimated by Renaker at 20 to 25 miles per hour (Supp. Tr. 2). Nothing in the record indicates that Roger McBeth at any time attempted to turn his automobile in any direction away from Respondent's tracks (Tr. 86-88, 90). Roger McBeth approached the tracks and proceeded to go across (Tr. 86, 88) neither looking to the east nor to the west at any time (Tr. 86).

Charles S. Johnson, a student at Arlington State College, driving west on West Jefferson Street, observed Roger McBeth's automobile for the first time as it approached the tracks (Tr. 88). Just prior to this time Johnson had been observing Respondent's train traveling west on the tracks to his right (Tr. 88). He had also observed that the signal lights at the Southwest 23rd Street crossing were flashing a color unidentifiable to him because of red and green color blindness (Tr. 88). Johnson noted that Roger McBeth did not stop before going on the tracks (Tr. 88). His automobile never varied its speed (Tr. 88).

Just as Roger McBeth's automobile was almost across Respondent's northern set of tracks, it was struck in the left rear quarterpanel by Respondent's train (Tr. 87, 88, 135). He was thrown out of his automobile and onto the roadbed (Tr. 3).

The record is void of any evidence indicating or inferring that Roger McBeth made the slightest attempt to avoid colliding with Respondent's train. Nothing in

the record shows that he attempted to stop his automobile within 50 feet but not less than 15 feet of Respondent's nearest rail as required by Texas law.[3] Nothing in the record shows that he was cognizant of his surroundings. Everything to be found in the record indicates that he was completely oblivious to what was going on about him. Immediately before reaching the intersection and for at least 100 feet while heading directly toward Respondent's tracks, the flashing signal lights were visible to him. In covering this 100 feet distance to Respondent's nearest rail, the slightest turn of the head or glance of the eye to the left would have revealed Respondent's approaching train, which was in hazardous proximity to the crossing (Tr. 165, 166, 167).

This record fails to contain anything which a court could consider or from which an inference might be drawn that Roger McBeth was in an impossible situation or operating under a sudden emergency so that he was unable to avoid the collision. But, even if the record indicated such, the same record establishes conclusively that Roger McBeth's own negligence caused such situation and this negligence was the proximate cause of the collision.

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[3]Article 6701d, § 86 (a) and (d), Revised Civil Statutes of Texas.

Article 6701d, Section 86(a) and (d), Revised Civil Statutes of Texas, and the Undisputed Facts

Article 6701d, Section 86, Revised Civil Statutes of Texas, provides in part as follows:

> "Sec. 86. Whenever any person driving a vehicle approaches a railroad grade crossing, the driver of such vehicle shall stop within fifty (50) feet but not less than fifteen (15) feet from the nearest rail of such railroad and shall not proceed until he can do so safely when:
>
> "(a) A clearly visible electric or mechanical signal device gives warning of the immediate approach of a train;
>
> * * *
>
> "(d) An approaching train is plainly visible and is in hazardous proximity to such crossing."

In light of the statute and the undisputed facts established by this record, the trial court, the Court of Civil Appeals for the Second Supreme Judicial District of Texas, and the Supreme Court of Texas had no choice but to grant and sustain, respectively, Respondent's motion for summary judgment. Not only was Roger McBeth's conduct statutory contributory negligence as a matter of law, but these same actions most assuredly constituted common law contributory negligence. Thus, the undisputed facts preclude any recovery by Petitioner from Respondent.

REASONS FOR NOT GRANTING THE WRIT

Texas and Federal Summary Judgment Practice

Rule 166-A, Texas Rules of Civil Procedure, which authorizes a summary judgment in a civil suit in Texas, and is the rule upon which the trial court acted in this case, is patterned after Rule 56, Federal Rules of Civil Procedure, 28 U.S.C. A comparison of the two rules reveals that the language in each is almost identical.

The constitutionality of such a rule was passed upon by this Honorable Court in *Fidelity & Deposit Company of Maryland v. United States*, 187 U.S. 315 (1902). The opinion reads in part as follows:

> "In *Smoot v. Rittenhouse* [27 Wash.L.Rep. 741] the validity of the rule was sustained, as well as the power of the court to make it. If it were true that the rule deprived the plaintiff in error of the *right* [emphasis that of the author of the opinion] of trial by jury, we should pronounce it void without reference to cases. But it does not do so. It prescribes the means of making an issue. The issue made as prescribed, the right of trial by jury accrues." 187 U.S. 319-320.

Additionally, the vigorous language in the opinion of this Court in *Ex Parte Peterson*, 253 U.S. 300 (1920) can leave no doubt that the summary judgment procedure provided in Rule 56 does not infringe the constitutional right of trial by jury. The opinion reads in part as follows:

> "The commandment of the 7th Amendment that 'the right of trial by jury shall be preserved' does

not require that old forms of practice and procedure be retained. [Authorities omitted]. It does not prohibit the introduction of new methods for determining what facts are actually in issue, nor does it prohibit the introduction of new rules of evidence. Changes in these may be made. New devices may be used to adapt the ancient institution to present needs and to make of it an efficient instrument in the administration of justice. Indeed, such changes are essential to the preservation of the right. The limitation imposed by the Amendment is merely that enjoyment of the right of trial by jury be not obstructed, and that the ultimate determination of issues of fact by the jury be not interfered with.

". . . No one is entitled in a civil case to trial by jury unless and except so far as there are issues of fact to be determined. It does not infringe the constitutional right to a trial by jury, to require, with a view to formulating the issues, an oath by each party to the facts relied upon." 253 U.S. 309-310.

See also *Page v. Work*, 9 Cir., 290 F. 2d 323 (1961), cert. den. 368 U.S. 875; *King v. United Benefit Fire Insurance Company*, 10 Cir., 377 F. 2d 728 (1967); *Lindsey v. Leavy*, 9 Cir., 149 F. 2d 899 (1945); *Moore, Federal Practice*, Vol. 6, § 56.06, pp. 2075-2080; *Barron & Holtzhoff, Federal Practice and Procedure*, Vol. 3, § 1234, p. 137, holding and supporting the foregoing.

The Courts of Texas in interpreting and implementing the Texas Rules of Civil Procedure often look to the Federal counterpart and the interpretation made

by the Federal Courts thereunder. An examination of the cases interpreting Federal Rule 56 and the Texas Rule 166-A, reveals that they are almost identical. The Texas cases considering the question of whether or not the granting of a summary judgment is a denial of right to trial by jury have held that it is not. *Wyche v. Works*, Tex.Civ.App., 373 S.W. 2d 558, 561 (Dallas, 1963), writ refused, n.r.e.; *Schroeder v. Texas & Pac. R. Co.*, Tex.Civ.App., 243 S.W. 2d 261, 263 (Dallas, 1951), no writ history.

In view of the fact that the right of trial by jury is the keystone of our judicial system, Respondent would be the last to ever deny that right to any litigant. But, it must be remembered that the sole function of a jury is to decide issues of fact, and if there are no fact issues to be decided *with respect to a motion for summary judgment*, then the jury has no part in the litigation. *Wyche v. Works*, Tex.Civ.App., 373 S.W. 2d 558, 561 (Dallas, 1963), writ refused, n.r.e.

Policy in Support of Summary Judgment

The record before this Court shows that the case was properly decided by the Texas Courts. The guidelines and criteria looked to by the Texas Courts in granting and sustaining Respondent's motion for summary judgment were not only consistent with Texas law and practice, but with the Federal law and practice. Further, the Supreme Court of the United States should not review cases from the various jurisdictions wherein the sole point presented is the propriety of the granting of a motion for summary judg-

ment. In particular, this should be so where the case has been considered by several reviewing Courts. In the instant case, Petitioner has already had his objection to Respondent's motion for summary judgment considered by 13 Judges, one more person than he would have on a jury, and his objection found wanting for merit. Respondent would add that if the proceedings before the trial court be considered a trial before the Court without a jury, it was because the Petitioner made it one (Tr. 185, 190-200), and he should not be able to complain of this.

Fourteenth Amendment Due Process and the Seventh Amendment

While Respondent takes the position that Petitioner has not been denied a right of trial by jury in that certain undisputed facts establish a defense which precludes any recovery by Petitioner from Respondent, Respondent invites the Court's attention to the fact that this Honorable Court has not read the Seventh Amendment into the due process clause of the Fourteenth Amendment. This Court has held that the Seventh Amendment applies only to trials in the Federal Courts. *Bute v. People of the State of Illinois*, 333 U.S. 640 (1948). Further, this Court has held that the State Courts may modify or abolish altogether trial by jury in civil actions. *Walker v. Sauvinet*, 92 U.S. 90 (1876); *Maxwell v. Dow*, 176 U.S. 581 (1900); *New York Central Railroad Company v. White*, 243 U.S. 188 (1917); *Wagner Electric Manufacturing Company v. Lyndon*, 262 U.S. 226 (1923).

And, finally, this Court has held that a denial of trial by jury in a State Court is not a denial of due process under the Fourteenth Amendment. *Hardware Dealers' Mutual Fire Insurance Company of Wisconsin v. Glidden Company*, 284 U.S. 151 (1931).

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Respondent prays that this Honorable Court refuse to grant a Writ of Certiorari in this case and by so refusing affirm the judgments of the Courts of the State of Texas.

Respectfully submitted,

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